IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1690

UNION BANK,

Petitioner.

v.

JAMES BLOOR, as Trustee in Reorganization of IFC Collateral Corporation and IFC Serramonte Estates Corporation, Debtors, and DAMAVANDI ENTERPRISES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT JAMES BLOOR IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals for the Second Circuit, reported at 592 F.2d 134, appears in the appendix* to the petition. The United States District Court for the Southern District of New York entered the order in controversy without opinion.

* References herein to the opinion of the Court of Appeals will be by citation to the Petitioner's Appendix (Pet. A.).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Is the reorganization court, in considering the application of the reorganization trustee to sell property free and clear of all liens, claims and encumbrances, and the objections to the sale made by the petitioner which holds a disputed lien, bound by a stipulation as to the value of the property between the reorganization trustee and the petitioner which was entered into in a different adversary proceeding commenced by the petitioner to modify the stay of lien enforcement, when the evidence presented at the hearing on the sale demonstrated that the value of the property was substantially higher than the stipulated value.

2. May a reorganization court delay a mortgagee, whose lien is one of several liens on property of the debtor and is disputed as to priority and amount, from exercising its rights to realize on the mortgaged property, if the purpose of such delay is to afford the reorganization trustee a reasonable opportunity to sell the property and thereby satisfy all valid and enforceable liens against the property and preserve a substantial equity for the debtors' estates.

Statutes and Rules Involved

Bankruptcy Act §116(3) (11 U.S.C. §516)

> Upon the approval of a petition, the judge may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon him and the court—
>
> * * *
>
> 3. authorize a receiver or a trustee or a debtor in possession, upon such notice as the judge may prescribe and upon cause shown, to lease or sell any property of the debtor, whether real or personal, upon such terms and conditions as the judge may approve . . . .

Chapter X Rule 10-607(b)

> (b) *Sale of Property.* The court may, on such notice as it may direct and for cause shown, authorize the trustee, receiver, or debtor in possession to lease or sell any real or personal property of the debtor, on such terms and conditions as the court may approve.

Statement of the Case

In order to demonstrate the reasons why the petition for a writ of certiorari should be denied, the reorganization trustee, pursuant to Supreme Court Rule 24, deems it appropriate to supplement the petitioner's presentation of the evidence and description of the proceedings below and to inform the Court of events which eliminate the factual predicate to the questions presented by petitioner.

Nature of the Case

Petitioner, Union Bank (the "Bank"), appeals from a judgment of the United States Court of Appeals for the Second Circuit affirming an order of the United States District Court for the Southern District of New York (Bonsal, D.J.), dated January 28, 1978 (the "Order"). The Order was entered in reorganization cases pending under Chapter X of the Bankruptcy Act (11 U.S.C. §§501-676), and authorized James Bloor, as Reorganization Trustee (the "Trustee") of IFC Collateral Corporation ("Collateral") and IFC Serramonte Estates Corporation ("Serramonte"), debtors, to sell approximately fifteen acres of vacant land owned by Serramonte (the "Property") subject to, among other things, mortgages* of the Bank and Collateral, for a cash purchase price of $1,440,000, free and clear of all liens, claims and encumbrances. The Order provided that all such liens, claims and encumbrances were to transfer and attach to the proceeds of sale, and the sale was to be pursuant to a contract of sale (the "Contract") between the Trustee and Damavandi Enterprises, Inc. ("Damavandi"). The Bank objected to the entry of the Order and alleged that (1) the Trustee did not have an equity in the Property because the aggregate amount of all liens asserted against the Property prior in right to the mortgage of Collateral exceeded the fair market value of the Property; and (2) approval of the Contract, which conditioned the sale on obtaining subdivision plan approval, stayed the Bank from enforcing its disputed lien for the one year period allowed to the purchaser to obtain subdivision plan approval.

* Although referred to herein as "mortgages," the liens held by the Bank and Collateral are in the form of deeds of trust.

On appeal, the Bank challenged the exercise of discretion by the reorganization court in permitting the sale to go forward with the disputed liens to attach to the proceeds, because this action would have temporarily delayed the Bank from enforcing its alleged lien. In the absence of an opinion by the reorganization court, the Court of Appeals reviewed the entire record, considered the Bank's objections and concluded that (1) "[a] finding that the estate has an equity in the property would thus plainly not be clearly erroneous" (Pet. A. A6); and (2) "[a] finding that the contract is in the best interests of the estate would also not be clearly erroneous." (Pet. A. A7). The Order was affirmed.

Supplemental Statement of Facts

By application, dated November 2, 1977, the Trustee applied to the reorganization court for approval of a contract of sale of the Property with Gemini Developers, Inc. ("Gemini") for a purchase price of $1,350,000* in cash, subject only to unpaid real estate taxes, if any, but free and clear of all other liens, adverse claims and encumbrances, including the mortgages on the Property held by the Bank and Collateral.** By order to show cause dated November 2, 1977, the reorganization court fixed December 7, 1977 as the date and time of a hearing to consider the Trustee's application.

At the hearing on December 7, 1977, there was active bidding for the Property, in amounts which substantially

* The application also sought leave to sell the Property to anyone else who might make a higher or better offer than the Gemini offer.

** All liens, adverse claims and encumbrances were to be transferred, affixed and attached to the proceeds of sale.

exceeded the original offer by Gemini. The reorganization court adjourned the December 7, 1977 hearing on the sale to January 4, 1978, when the hearing resumed. At that hearing, Damavandi was the highest bidder. The Damavandi bid actually increased the net amount which would be realized for the Property by approximately $176,000. The reorganization court thereafter entered the Order which, *inter alia*: (i) authorized the Trustee to sell the Property to Damavandi for the sum of $1,440,000 pursuant to a contract which conditioned the sale upon subdivision plan approval by Daly City; and (ii) withdrew the earlier reference of the Bank's adversary proceeding to the special master.

As noted by the Court of Appeals, there was evidence at the first hearing "that the trustee had been soliciting offers for the property for over a year; at least four offers to purchase had been made, each of which was conditioned upon the offeror's receiving 'subdivision approval' from the local planning board; [and] the Daly City Planning Board might look favorably upon the construction of a substantial project on the property, particularly in light of the board's prior approval for a previous owner of a higher density subdivision . . . ." (Pet. A. A7).

During the hearing, the Bank referred to a stipulation from a different proceeding as evidence of the value of the Property. The stipulation had been reached in an adversary proceeding commenced by the Bank in 1975* for leave to foreclose its mortgage. The adversary proceeding had been referred to Hon. John J. Galgay, Bankruptcy Judge,

* The adversary proceeding commenced by the Bank was more than two years old at the time of the hearing.

as special master, to hear and report to the reorganization court. The stipulation set the fair market value of the property, *without subdivision plan approval*, at one million dollars.

The Bank's description of the Contract as an option is "incorrect." (Pet. A. A8, n.3). The Court of Appeals determined that the Contract is a "conditional contract." (*Id.*). "Because Damavandi must seek plan approval and must purchase the land if it obtains approval, [the Contract] lacks the contractual freedom characteristic of an option." (*Id.*).

For purposes of considering the Trustee's application to sell the Property and the Bank's objections thereto, the Court of Appeals determined that a realistic valuation of the Property is closer to the Contract price than to the fair market value of the land before subdivision approval. (Pet. A. A7). The Court of Appeals found that even though the sale is conditioned upon Daly City's subdivision plan approval, "[t]here is good reason to believe that the sale will be completed: Daly City had already approved a plan with greater density housing than the sale contract contemplated; [and] there are further indications that Daly City will approve the subdivision plan . . . ." (Pet. A. A7).

In objecting to a sale of the Property which would realize $1,440,000, the Bank asserts here, as it did below, (i) its alleged lien is almost $800,000 and (ii) there are outstanding mechanics' liens which with interest may total $709,000. (Pet. 4, Pet. A. A7).

The respondent notes here, as did the Court of Appeals below, that (a) the Bank has not disputed the Trustee's

argument that, according to California law, the lien of the purchase money deed of trust held by Collateral is superior to the mechanics' liens; (b) the principal amount of the Bank's claim is approximately $460,000; (c) the Bank and the Trustee had both asserted title to a fund of $250,000 held by the Bank which would offset and reduce *pro tanto* the amount claimed by the Bank;* and (d) the mechanics' liens, the priority of which is being litigated in state courts, are in many cases duplicative and overstated. (Pet. A. A7). The outstanding mechanics' liens, eliminating duplication, are no more than $420,000. The Bank has failed to disclose to this Court that it has already obtained judgments against approximately $150,000 of the non-duplicative mechanics' liens. Thus, the outstanding mechanics' liens have been reduced to approximately $270,000, without interest, and the remainder of the liens are being disputed and challenged by the Bank and the Trustee. The Court of Appeals also noted the Trustee's contention that the $880,000 deed of trust held by Collateral is superior to the Bank's lien. (Pet. A. A7).

Finally, the Court of Appeals recognized that by permitting the sale to go forward, the Trustee would have an opportunity to realize a substantial equity, but the Bank would be prevented from foreclosing for a period of approximately one year. The Court of Appeals found that the delay in realization of money from the Property pursuant to this sale would not unduly burden the Bank, endanger its interest or impose financial strain on the Bank. (Pet. A. A8).

* The Trustee prevailed in the litigation with the Bank over the $250,000 fund and judgment was entered for the amount of $250,000 plus attorneys' fees of $50,000 plus interest at the rate of 7% per annum from October 1, 1974. The Bank has appealed from the judgment and has not yet paid it.

Reasons for Denying the Writ

I

Petitioner may not collaterally attack concurrent findings of fact by two courts below.

The writ should be denied because the Bank has not made a showing of "clear error" in the findings of fact made by the reorganization court or the Court of Appeals. *Pick Manufacturing Company* v. *General Motors Corporation*, 299 U.S. 3, 4 (1936). The Bank's principal argument is that the courts below disregarded the stipulation between the parties as to the value of the Property, even though the stipulation was entered into for a different purpose in a different proceeding. The Bank seeks to have this Court determine that the concurrent findings of fact of the reorganization court and the Court of Appeals as to the value of the Property should be rejected, and the stipulation between the parties in a different proceeding should be given the force of a judgment. Such a collateral attack on the findings of fact of the courts below should not be countenanced.

> A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.

Graver Tank & Manufacturing Company v. *Linde Air Products Company*, 336 U.S. 271, 275 (1949).

The Bank has not demonstrated any basis for exception to the well established "two court rule" in this case. The *ipse dixit* contention that a stipulation between the Bank

and the Trustee precluded consideration by the reorganization court of additional evidence of the value of the Property is without any supporting authority. The Trustee submits that a stipulation regarding the fair market value of the Property *without subdivision plan approval* which was a part of a separate adversary proceeding to lift the stay does not bar the consideration by the reorganization court of additional evidence regarding value on the Trustee's application to sell the Property subject to subdivision plan approval. The Bank's contention was soundly rejected by the Court of Appeals. (Pet. A. A4). *See Insurance Company of North America* v. *Northwestern National Insurance Company*, 494 F.2d 1192, 1196 (6th Cir. 1974) ("We note here, as did the trial judge, that the facts in the stipulation were largely bare-bones and that the additional proof did not contradict the agreed facts but added flesh and life to them, and in so doing presented the understandable controversy to which the judge could apply the law and his appropriate judicial fact-finding function. . . ."); *accord*, *H.B. Zachry Company* v. *United States*, 344 F.2d 352 (Ct. Cl. 1965).

The Bank is attempting to utilize this argument to secure yet a third review of facts which were before and considered by the reorganization court and the Court of Appeals. (Pet. A. A4, A7). Where, as here, the petition seeks reconsideration of the concurrent findings of fact respecting the debtor's equity in the Property, the writ should not be granted.

As this Court has consistently held:

> Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it. (citations omitted). Moreover the decision on that point rests on concurrent findings. They are not to be disturbed unless plainly without support. (citations omitted).

General Talking Pictures Corporation v. *Western Electric Company*, 304 U.S. 175, 178 (1938).

The reorganization court and the Court of Appeals found that the value of the Property was such that the debtor had an equity. Nothing has been shown by the Bank to warrant re-examination.* The finding of equity in the Property, which the Bank contested on the grounds that the liens on the Property exceed the value of the Property, has been buttressed by the judgments invalidating some of the mechanics' liens and the award to the Trustee of the $250,000 fund held by the Bank, thereby reducing the Bank's claim.**

II

The case presents a narrow issue addressed to the sound discretion of the reorganization court.

The Bank's objections to the sale of the Property have been resolved twice in favor of respondents. These decisions have no impact outside of this case. As the Trustee has demonstrated, and the Court of Appeals has recognized (Pet. A. A8), the Order was entered following a detailed

* In fact, events subsequent to the decisions below have confirmed the findings below. Damavandi is prepared to close the sale and pay the agreed price of $1,440,000 as soon as title insurance can be issued. As the Bank is aware, the only impediment to the issuance of a policy of title insurance is the finality of the Order, which has been prevented by the Bank's petition.

** See p. 8, *supra*.

examination of complex facts. Consistent with prior holding of this and other courts, the Court of Appeals determined that:

> A year's delay in realization of money . . . would not unduly burden the appellant bank: the bank is in no danger of losing its interest, and it will suffer no great financial strain from a deferred payment.
>
> * * *
>
> The delay in the present case has not been unreasonable given the complexity of the estate, the complications in respect to claims asserted against the property, and the possibility of a viable reorganization plan, as well as the fact that some of the delay may have been of the bank's own making.
>
> We conclude that the authorization of the sale contract by the trial judge was not an abuse of discretion, given the support in the record for the necessary findings that the trustee had an equity in the property and that the sale is equitable for all concerned.

Pet. A. A8.

This Court has long recognized the power of a reorganization court to stay secured creditors. *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Railway Company*, 294 U.S. 648 (1935). Although *Rock Island* involved a railroad reorganization proceeding under Section 77 of the Bankruptcy Act, *Rock Island* was applied in a Section 77B corporate reorganization and subsequently has been applied in proceedings under Chapter X of the Bankruptcy Act. *In re Prudence-Bonds Corporation*, 77 F.2d 328 (2d Cir.), *cert. denied*, 296 U.S. 584 (1935); *In re United States Realty & Improvement Company*, 153 F.2d 853 (2d Cir. 1946).

In *Rock Island*, pledgees of the debtor's securities were enjoined from selling the collateral in their possession. In

rejecting the secured creditor's challenge to the power of the reorganization court to prevent sale of the collateral, this Court recognized the power of the reorganization court to delay a secured creditor from enforcement of rights to collateral and declared its unwillingness to interfere with a proper exercise of that power.

> A claim that injurious consequences will result to the pledgee or mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised.

294 U.S. at 677.

This Court rejected the pledgees' contention that they could not be indefinitely delayed in foreclosing, reasoning that

> [T]he delay is obviously due to the many doubts and uncertainties arising from the present litigation. . . . The delay and expense incident to . . . foreclosure sales constituted, probably, the chief reasons which induced the passage of §77; and to permit the perpetuation of either of these evils under this new legislation would be subversive of the spirit in which it was conceived and adopted.

294 U.S. at 685.

The same reasoning is equally applicable here. The Bank now complains of delay, as did the pledgees in *Rock Island*, asserting a question of fundamental importance in the administration of a reorganization case. In effect, the Bank asks the same question this Court has already de-

cided, *i.e.*, whether delay alone is sufficient justification to permit foreclosure.* This Court has already recognized that such a result is undesirable. 294 U.S. at 685.

Petitioner relies exclusively on *Lincoln-Alliance Bank & Trust Company* v. *Dye*, 115 F.2d 234 (2d Cir. 1940) to assert a contrary position and to frame its "important" question. This reliance is misplaced. The Court of Appeals did not base its decision in *Lincoln-Alliance* solely on the passage of time. That decision was based on the absence of any justification for the delay in administering what was essentially the sole asset of the debtor's estate, in which there was little, if any, equity. The same court has found justification for the delay occasioned by the sale of the Property.

This case is not the exceptional case presented by *Lincoln-Alliance*, *supra*, but is one well within the established rule applied in reviewing orders pursuant to Section 116(3) of the Bankrupty Act. This rule is set forth in *Frank* v. *Drive-O-Matic*, 136 F.2d 906 (2d Cir. 1943), where the Court of Appeals refused to interfere with the district court's approval of a sale:

> To succeed the appellants must persuade us to substitute our discretion for that of the district court, and that under familiar principles we should not, and will not do.

136 F.2d at 906.

* Even if the Bank had been permitted to institute a foreclosure proceeding, the attendant delay due to the multiplicity of claims asserted against the Property, would approximate, if not exceed, the one year allowed for closing the sale in controversy.

There is no conflict among the circuits respecting this rule. *See In re Wonderbowl, Inc.*, 424 F.2d 178, 180 (9th Cir. 1970); *In re Dania Corporation*, 400 F.2d 833 (5th Cir. 1968), *cert. denied*, 393 U.S. 1118 (1969); *In re Air and Space Manufacturing, Inc.*, 394 F.2d 900, 902 (7th Cir. 1968).

The Second Circuit has followed a long and unbroken line of authority in affirming orders of sale free and clear of encumbrances when the sales prices exceeded the encumbrances and the validity of the encumbrances was in question. *Van Huffel* v. *Harkelrode*, 284 U.S. 225 (1931); *In re Miller*, 95 F.2d 441 (7th Cir. 1938); *In re National Grain Corporation*, 9 F.2d 802 (2d Cir. 1926); *Wilson* v. *Continental Building & Loan Association*, 232 F. 824 (9th Cir. 1916).

As the rule was articulated in *National Grain*, where the Court of Appeals reversed the district court to affirm and reinstate the order of the bankruptcy referee authorizing a sale free and clear of encumbrances:

> The fact that the value of the real property to be sold was less than its recorded mortgages was not decisive, where the validity of some of the incumbrances is questioned. In each instance the determination of the bankruptcy court to sell free of liens depends upon the particular facts. . . . [I]f there is justification for the opinion that there will be an equity which will add to the assets of the estate, the court may and should order such sale free of liens. . . .
>
> Such judicial and discretionary power of the referee should not be disturbed . . . especially where the referee reports that he has entire confidence and believes it to be for the best interest of the estate to order a sale free of incumbrances in disposing of the property. Only manifest error would justify a reversal. . . . (citations omitted).

9 F.2d at 803-04.

This case is not the exception to the rule as was *Lincoln-Alliance, supra.* Here two courts found justification for the delay, a dispute as to the validity of the encumbrances, and that the sale would be in the best interest of the estate. No manifest error has been shown.

III

Delay is not an important consideration in this case.

Although the Bank has identified delay in satisfaction of its claims as an important question, it fails to identify a cause of the Court of Appeals' contrary view—"some of the delay may have been of the bank's own making." (Pet. A. A8). The Court of Appeals noted then, and the Trustee notes now, that the Bank's creation of and contribution to the allegedly "indefinite delay" undermines its allegation of importance.

The Bank knows that Damavandi is ready, willing and able to purchase the Property for an amount far in excess of the Bank's claim as soon as title insurance can be obtained. As the Bank is also well aware, that event cannot occur until the Order is final. The Bank's willingness to prolong the delay and prevent the establishment of a cash fund to satisfy its claim belies its claim of importance regarding delay. It is, and has been, within the Bank's power to eliminate the delay complained of. By its own action, the Bank has effected a further stay against satisfaction of its claim and now asks this Court for relief from a situation it unilaterally created and continues to perpetuate.

A writ of certiorari should not be granted to consider a question which has no real importance and which is not even important to the petitioner.

Conclusion

For these reasons the petition for a writ of certiorari should be denied.

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